

DATE: JUNE 6, 1996

CASE NO: 94-INA-575

In the Matter of

BELLPORT COUNTRY CLUB
Employer

on behalf of

LAURO YANZA
Alien

Before: Jarvis, Vittone and Wood
Administrative Law Judges

DONALD B. JARVIS
Administrative Law Judge

DECISION AND ORDER

This case arises from Bellport Country Club's ("Employer") request for review of the U.S. Department of Labor Certifying Officer's ("CO") denial of a labor certification application. The certification of aliens for permanent employment is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under §212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

STATEMENT OF THE CASE

On May 25, 1993, the Employer filed a Form ETA 750, Application for Alien Labor

Certification, with the New York State Department of Labor ("NYDOL") on behalf of the Alien, Lauro Yanza. AF 1, 9. The job opportunity was listed as "Cook," and the minimum requirements were two years of experience in the job offered, or two years of experience in the related occupation of "Apprentice Cook." AF 9. The job duties were listed as follows:

Will prepare, season, cook seafood, meats, fish, vegetables, salads, pastries, desserts for consumption by members and their guests in country club dining room.

AF 9.

On July 27, 1993, the NYDOL requested that the Employer amend its wage/salary offer and the Alien's statement of qualifications. AF 10-12. In response, on August 5, 1993, the Employer's attorney sent a letter stating only that the Employer requested the NYDOL to provide the basis for its prevailing wage determination. AF 13. On October 1, 1993, the NYDOL cancelled the Employer's application on the basis that its response to the NYDOL's requests was neither timely nor complete. AF 14.

On October 25, 1993, the Employer refiled its application for alien labor certification with the NYDOL on behalf of Lauro Yanza. AF 15-18. The wages offered by the Employer were amended to correspond to the NYDOL's determination regarding the prevailing wage for this position. AF 21.

The Employer was thereafter authorized to advertise the position, and the NYDOL forwarded to the Employer seven resumes that it had received in response to the Employer's advertisements. AF 26-27. The Employer was instructed to document the results of its recruitment.

On January 18, 1994, the Employer, through its counsel, notified the NYDOL that only five of the seven applicants had called the Employer for an interview, and that of those five applicants, none were qualified for the job. AF 75. The Employer's counsel stated that applicant Mike Michaels was rejected because his "supervisors and dates of alleged employment could not be verified." *Id.* In this regard, Employer's counsel stated that one of the supervisors that the applicant said he had worked under three years before had actually left that position seven years earlier, and that although the applicant's resume indicates that he worked at the "Days Inn Hotel in Holtsville, NY," there is no hotel with this name in Holtsville. *Id.* As well, Employer's counsel indicated that the applicant's inability to complete an application at the time of the interview led the Employer to "suspect" that he cannot read and write. *Id.* Employer's counsel also stated that applicant Tom Black was not hired because he neither showed up for his scheduled interview, nor called in order to postpone or cancel the interview. AF 74. Although the Employer's counsel did not include the Employer's reasons for rejecting applicant Leonard F. Bosshammer in the body of his letter, a written note on a copy of Mr. Bosshammer's resume which is attached to the letter states: "No actual cooking exp. No knowledge of sauces - must use our recipe only. No knowledge of meat temps. for wellness." AF 67. Since the Employer's recruitment effort had been unsuccessful, the application was sent to the CO on March 22, 1994. AF 85.

On April 18, 1994, the CO issued a Notice of Findings (NOF) proposing to deny the application on the following grounds: (1) the Employer did not provide the results of its recruitment efforts as required by the regulations, but instead responded through its attorney; (2) the Employer chose to run its advertisement in *New York Newsday*, despite the fact that it

had been approved to run its ad in *Long Island Newsday*, a newspaper that covers Suffolk County, the area where the job opening is located; and (3) the Employer did not engage in a good faith recruitment effort. AF 86-90. In order to remedy the first two violations, the CO required the Employer to "acknowledge concurrence" with its counsel's recruitment report and offer to place a new advertisement in the appropriate publication. AF 87.

In regard to the Employer's good faith recruitment effort, the CO found that applicant Michaels, with 31 years of experience as a cook, applicant Black, with 27 years of experience as a cook and assistant cook, and applicant Bosshammer, with over 2 years of experience as an assistant cook, appeared to meet the Employer's minimum job requirements. In addition, the CO found that there were discrepancies between what the Employer said in its recruitment report and what these applicants said in response to inquiries by the NYDOL. For instance, applicant Michaels stated that the Employer could not find the Days Inn Hotel in Holtsville because it is now known as the "Strathmore Hotel," a fact which the CO indicated that she had confirmed. AF 88-89. Thus, the CO indicated that the Employer should have further verified applicant Michaels' references before rejecting him. AF 88. In regard to the Employer's rejection of applicant Michaels because of his "suspected" illiteracy, the CO noted that the job opening had no educational requirement and that the applicant stated that he did not fill out the application at the interview because he did not have his eyeglasses with him. AF 88. Concerning the CO's allegedly illegal rejection of applicant Black, the CO noted applicant Black's statement that he did not show up at his scheduled interview "due to weather conditions and the death of my mother-in-law." AF 88. In addition, applicant Black also stated that although he attempted to interview the following day, when he arrived at the Bellport Long Island Rail Road Station, he telephoned the Employer but was told that "they were going to keep the present cook for the position and thanks for coming out." AF 88. In regard to applicant Bosshammer, the CO stated:

Attorney states that Mr. Bosshammer "had no actual cooking experience nor any knowledge of the preparation of sauces, gravies nor of the proper temperature for the cooking of various beef dishes." Mr. Bosshammer responded [sic] indicated that he was also interviewed by "Frank" and was "informed the Bellport Country Club was looking to find someone to run their one-man kitchen... Since the interview, I have had no further communication with B.C.C."

AF 88. The CO requested that the Employer respond to the noted discrepancies and provide documentation showing that the applicants were not qualified, willing, or available at the time of initial consideration and referral. AF 87.

The Employer responded with rebuttal on May 18, 1994. AF 94-98. Included in the rebuttal is the "affidavit of publication" of Kathleen Simmons, the principle clerk of *Newsday*, attesting to the appearance of the Employer's advertisement in the New York, Nassau and Suffolk editions of *New York Newsday*. AF 94. In addition, the Employer stated that it concurred with everything stated by its counsel in the January 18, 1994 recruitment report. AF 96. Finally, in regard to its reason for rejecting applicant Michaels, the Employer indicated that his resume was:

very unspecific as to his past employment. No dates were given. We tried to communicate with the owner of the first place of employment listed - Baron Four - and learned that Helen Feiffer, who he listed as the owner, had left seven years ago although Mr. Michaels told us that he worked for her three

years ago.

AF 96. The Employer pointed out, however, that its most "serious reason" for rejecting applicant Michaels was its General Manager, Frank VanGuilder's, "very strong belief" that "Mr. Michaels might well be illiterate." AF 95-96. This belief was apparently based on the fact that the applicant did not write anything during the interview, was "unable" to complete the employment application at the time of the interview, and even though he was given the opportunity to return and fill out the application, he "insisted that the job application be taken in blank and mailed to us." According to Employer, the applicant said nothing to Mr. VanGuilder about his eyeglasses, and the Employer stated that "it would certainly seem" that an applicant who needed glasses would bring them to an interview. AF 95. In regard to applicant Black, the Employer stated that it did not receive a call from Mr. Black asking to cancel or reschedule his interview and that Mr. Black did not call back on the day after his scheduled interview, "nor anytime thereafter." AF 95. The Employer stated:

It certainly seems odd that Mr. Black would "stand me up" and then, on the very next day, without a commitment, take the Long Island Railroad to Bellport. His story is incredible.

AF 95. In regard to applicant Bosshammer, the Employer stated that following the

interview, Mr. VanGuilder was satisfied that this applicant was not qualified to fill the position of cook because he had no actual cooking experience and because:

[h]e had no knowledge of the preparation of sauces, gravies, and most importantly of the proper temperature for cooking various beef dishes. We cannot risk violating Board of Health requirements and certainly do not want to risk the potential of making our members and their guests ill or dissatisfied with improperly prepared food.

AF 95.

The CO issued a Final Determination ("FD") denying certification on May 25, 1995. AF 99-102. The CO indicated that the Employer's documentation regarding its advertisements in *Newsday* and its concurrence with its counsel's representations in the January 18 recruitment report successfully rebutted the CO's findings on these issues. AF 101. However, the CO found that the Employer had failed to adequately demonstrate that the U.S. workers were not qualified, willing or available to perform the job. AF 99. Regarding applicant Michaels, the CO noted the Employer's statements that it could not contact one of his references and that it has a "very strong belief" that he is illiterate. However, the CO stated:

Employer does not address the discrepancy concerning the Days Inn Hotel; does not document who at the Baron Four Restaurant told him Ms. Feiffer left several years ago; and presents nothing more than a supposition that it "would certainly seem" that Mr. Michaels would have brought his glasses to the interview. Mr. Michaels [sic] signed response to post recruitment follow-up does not appear to be "illiterate" and, we note, per Item 14, ETA Form 750A, the employer does not require any education, either grade or high school.

AF 99. The CO also noted the Employer's rebuttal concerning applicants Black and Bosshammer, but noted that the Employer did not address applicant Bosshammer's allegations. AF 99. In addition, the CO stated:

While we do not question the veracity of the employer's statements, neither do we automatically question the statements made by these three U.S. workers. Although we place no greater weight on either the employer's or the applicant's statements, there are three U.S. workers who independently contradict the employer's statements and allege that they were effectively discouraged by the employer. Employer's failure to address several of the discrepancies we noted in our Notice of Findings and his use of the terms such

as "very strong belief" and "it would seem", does not provide sufficient information or evidence to discredit the statements of these three U.S. worker's [sic]."

AF 99.

The Employer filed a request for review of the denial of labor certification on June 8, 1994 and filed its supporting brief on September 28, 1994. AF 112-14.

DISCUSSION

The Board has held that the requirement of a good faith effort to recruit qualified U.S. workers is implicit in the regulations found at Title 20 of the Code of Federal Regulations, Part 656. *H.C. La March Ente., Inc.*, 87-INA-607 (Oct. 27, 1988). Actions by the employer that do not show a good faith recruitment effort or that prevent qualified U.S. workers from further pursuing their applications are therefore a basis for denying certification. *Oriental Healing Arts Institute*, 93-INA-75 (Sept. 26, 1994). In such circumstances, the employer fails to show that there are not sufficient U.S. workers who are "able, willing, qualified and available" to perform the work. *Id.*; 20 C.F.R. §656.1.

The Board has held that where an applicant's resume raises a reasonable possibility that he or she is qualified for the job, an employer bears the burden of further investigating the applicant's credentials. *Gorchev & Gorchev Graphic Design*, 89-INA-118 (Nov. 29, 1990) (*en banc*). As noted in *Gorchev*, the employer's burden of further investigation can be accomplished by "interview or other means," and panels of the Board have held that under certain circumstances, such other means may include sending the applicant a written request for clarifying information.

Applicant Michaels' resume indicates that he has 31 years of experience as a cook, and it therefore raises a reasonable possibility that he is qualified for the job. Therefore, when employer was unable to contact his prior supervisor, Helen Feiffer, it had the obligation to contact the applicant to find out why it was unable to do so. *See Relief Printing Corporation*, 89-INA-346 (Jan. 23, 1991). Indeed, had the Employer questioned the applicant concerning the reason there was no Days Inn Hotel in Holtsville, it would have learned that the hotel was now called the Strathmore. In this regard, we also note that the Employer did not respond to the discrepancy noted by the CO concerning the Days Inn Hotel, as it was required to do by the NOF.

In addition, we note that the Employer did not adequately document that applicant Michaels is illiterate, and we therefore cannot find this to be a lawful, job-related reason for his rejection. Written assertions that are not reasonably specific and do not indicate their sources or bases shall not be considered documentation. *Gencorp*, 87-INA-659 (Jan. 13, 1988). Thus, the Employer's "very strong belief" that the applicant is illiterate is not sufficient evidence to adequately document that the applicant is, in fact, illiterate,¹ or to support a lawful reason for rejecting him. *Cf. Hill-Fister Engineers, Inc.*, 89-INA-114 (Feb. 6, 1990) (Where application makes no mention of the ability to perform strenuous physical labor, nor physical disablement, the employer's unsubstantiated judgment that the applicant does not have the physical wherewithal to perform the job cannot be accepted).

Furthermore, even if we were to presume that the applicant is illiterate, the Employer still would not carry its burden of showing that it rejected Mr. Michaels for lawful, job-related reasons. As stated previously, the applicant clearly meets the minimum requirement of two years of experience as a cook. In addition, we note that the application does not contain a minimum educational requirement. An employer may not reject otherwise qualified U.S. applicants for not possessing requirements which are not specified in the application for certification. *See, e.g., Cap Gemini America*, 88-INA-426 (Sept. 25, 1989). Moreover, we note that the following job duties were listed in the application for certification:

Will prepare, season, cook seafood, meats, fish, vegetables, salads, pastries, desserts for consumption by members and their guests in country club dining room.

The duties listed above do not require the applicant to read or write. Although it is possible that a cook might be required to perform duties that require literacy, *i.e.*, preparing dishes according to exact recipes, doing inventory, or preparing and checking invoices for food and restaurant supplies, the job duties listed by the Employer do not require any of these tasks. It is reasonable to conclude that a cook with 31 years of experience could perform the duties listed in the application for certification, whether he is literate or not. We therefore conclude that the Employer has not shown that it rejected applicant Michaels for lawful, job-related reasons.

In regard to applicant Black, we note that his 27 years of experience as a cook and assistant cook also raises a reasonable possibility that he is qualified for the job. Mr. Black stated in his response to the NYDOL's questionnaire that he missed his scheduled interview because of inclement weather and the death of his mother-in-law. Normally, evidence of an applicant's failure to respond is sufficient to show that he or she is unavailable. *See Metrodata Services*, 88-INA-32 (Mar 13, 1989). However, if the applicant was unable to attend the scheduled interview because of his mother-in-law's death, his failure to show up for, or call to cancel the interview may not be a sufficient reason for the Employer to reject him. The applicant stated that he telephoned the Employer on the day after his scheduled interview, but was told that the position was no longer open. In the NOF, the CO required the Employer to respond to the applicant's allegation and properly placed the burden of proof on the Employer to document its assertion that applicant Black was properly rejected as

¹ Indeed, we note that the Employer need only have asked the applicant whether or not he was literate in order to have obtained sufficient evidence, rather than it having to rely on pure supposition.

unavailable. *Annette Gibson*, 88-INA-396 (June 20, 1989). The Employer, however, responded by simply reasserting that the applicant never called after the day of his scheduled interview. A CO may not assume that the weight of the evidence is generally afforded to a U.S. applicant whose statements contradict those of an employer. *Red Jacket Orchards, Inc.*, 94-INA-133 (July 17, 1995) (*citing Dove Homes*, 87-INA-680 (May 25, 1988) (*en banc*)). However, when an employer and applicant contradict each other and the employer offers no evidence to support its position, the CO properly accords more weight to the applicant's statements. *Jersey Welding & Fence Co.*, 93-INA-43 (Oct. 12, 1993) (*citing Robert B. Fry, Jr.*, 89-INA-6 (Dec. 28, 1989)). Moreover, when an employer makes only unsupported, cursory statements regarding its recruitment efforts which are in conflict with the independent assertions of U.S. applicants, here, applicants Michaels and Black, more weight is given to the independent assertions of the applicants. *Jersey Welding & Fence Co.*, 93-INA-43 (Oct. 12, 1993) (*citing, Pak Trading Co., Inc.*, 90-INA-251 (Apr. 8, 1992)).

In view of this determination, the remaining issues need not be discussed.

ORDER

The denial of alien labor certification is AFFIRMED.

For the Panel:

DONALD B. JARVIS

Administrative Law Judge

DBJ/mg/bg